IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-208

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Appellants,

against

JEAN-MARIE MAUCLET,

Appellee.

EWALD B. NYQUIST, Commissioner of Education of the State of New York, THE UNIVERSITY OF THE STATE OF NEW YORK, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THE NEW YORK HIGHER EDUCATION ASSISTANCE CORPORATION, WILLARD C. ALLIS, DR. ERNEST BOYER, DR. JUDAH CAHN, WILMOT R. CRAIG, THOMAS P. DENN, WALTER A. KASSENBROCK, NORMA KERSHAW, REV. LAURENCE J. MCGINLEY, S. J., WILLIAM G. MORTON and RUSSEL N. SERVICE, being the members of the board of directors of said corporation, and THE NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Appellants,

against

ALAN RABINOVITCH,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE WESTERN AND EASTERN DISTRICTS OF NEW YORK

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE WESTERN AND EASTERN DISTRICTS OF NEW YORK

JURISDICTIONAL STATEMENT

. Ewald B. Nyquist, Commissioner of Education of the State of New York, and the above-named public officials and agencies ("appellants") appeal from a judgment of the United States District Court for the Western and Eastern Districts of New York (statutory three-judge court), dated March 26, 1976. The judgment declares New York Education Law § 661(3) invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and permanently enjoins its enforcement. New York Education Law ("NYEL") § 661(3) authorizes state financial aid for any eligible student pursuing a higher education who is a United States citizen, an alien willing to apply for citizenship when capable of doing so or one of a class of refugees with parole status. This Jurisdictional Statement is submitted with a Motion to Dismiss or Affirm in *Rabinovitch* v. *Nyquist,* Doc. No. 75-1809. In that appeal, Alan Rabinovitch, an appellee herein, seeks reversal of the March 26 judgment insofar as it denies him damages equal to the state financial aid he alleges he would have received but for his refusal to apply for United States citizenship.

Opinions Below

The opinion of the single district judge in support of the convening of a three-judge court in *Mauclet* v. *Nyquist,* is not reported. It is reproduced in Appendix A, pp. 1a-3a, to this Jurisdictional Statement.

The opinion of the single district judge in support of the convening of a three-judge court in *Rabinovitch* v. *Nyquist,* is not reported. It is reproduced in Appendix B, pp. 4a-10a.*

* This opinion is also reproduced in Appendix C, pp. 12a-17a, to the Jurisdictional Statement in *Rabinovitch* v. *Nyquist, et al.,* Doc. No. 75-1809.

The opinion of the three-judge district court, dated February 11, 1976, is reported at 406 F. Supp. 1233 (E D & W.D.N.Y.). It is reproduced in Appendix D, pp. 13a-18a.*

Jurisdiction

The jurisdiction of this court is conferred by 28 U.S.C. § 1253.

The judgment of the three-judge district court was filed on March 29, 1976 and is reproduced in Appendix E, pp. 19a-20a.

The Notice of Appeal to this court was filed on May 28, 1976 and is reproduced in Appendix F, p. 21a.

State Statute Involved

New York Education Law § 661, as amended by c. 663, § 1 of the New York Laws of 1975, effective July 1, 1975, states in part:

Eligibility requirements and conditions governing awards and loans

• • •

3. Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship, or (d) must be an individual of a class of refugees paroled by the attorney general of the

* This opinion is also reproduced in Appendix C, pp. 5a-11a, to the Jurisdictional Statement in *Rabinovitch* v. *Nyquist, et al.,* Doc. No. 75-1809.

United States under his parole authority pertaining to the admission of aliens to the United States.[*]

Questions Presented

1. Should New York Education Law § 661(3) be reviewed under a strict equal protection standard because it excludes some alien students from state aid for higher education?

2. Is the denial of state aid to alien students who refuse naturalization under § 661(3) reasonably or substantially related to New York's interest in distinguishing those students who are the proper objects of its public funds from those who are not and to its interests in expanding its political community and in educating its electorate?

3. Does appellee Rabinovitch have standing to challenge § 661(3) insofar as it limits student loans to citizens and designated classes of aliens although he has not applied for a loan and had he applied, the loan might have been denied without regard to § 661(3).

Statement of the Case

Appellees Mauclet and Rabinovitch are permanent resident aliens (13a).** Appellee Mauclet is a French citizen and a graduate student at the State University of New York at Buffalo (14a). He filed a timely application for $600 tuition assistance for the academic year 1974-1975. NYEL §§ 604(1), 667. His application was denied (*Ibid.*) upon his failure to provide the State Education Department with proof of the filing of a petition for naturalization. Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 4 (hereinafter "Mauclet Memorandum"). Appellee Mauclet has resided in New York State since April 1969, is married to an American citizen and the father of a child of that marriage (14a). He "intends to reside permanently in the United States . . . [but] does not wish to relinquish his French citizenship at this time," Mauclet Memorandum, p. 4.

Appellee Rabinovitch is a Canadian citizen (14a) and an undergraduate student at Brooklyn College in New York City. Amended Complaint ¶ 16. In April 1973, he was advised by the State Board of Regents that he had qualified for a Regents Scholarship on the basis of his performance on an examination held for that scholarship (14a and Amended Complaint ¶ 13). See NYEL §§ 605(1), 670. He was provided with the appropriate forms for the Regents Scholarship and for tuition assistance [NYEL §§ 604(1), 667] together with an application for United States citizenship. He refused to complete the citizenship application and was subsequently advised that the offer of the Regents Scholarship was withdrawn because of that refusal (14a and Amended Complaint ¶¶ 14, 15). Although appellee Rabinovitch has never applied for a state student loan (NYEL § 680 *et seq.*), he alleged that he believed he would need such loans in the future and that he believed he would be disqualified by operation of NYEL § 661(3) (15a and Amended Complaint ¶ 20). Appellee has resided in New York State since 1964 (Amended Complaint ¶ 16), "intends to continue to reside . . . in New York," and "intends to retain his Canadian citizenship . . . not . . . to seek naturalization as an American citizen" (Amended Complaint ¶ 18).

Appellees commenced separate actions for declaratory and injunctive relief against NYEL S661(3). *Mauclet* v. *Nyquist* was commenced in the Western District of New York, and *Rabinovitch* v. *Nyquist* was commenced in the Eastern District of New York. *Mauclet* challenged NYEL

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* Phrase "(d)" was added by c. 663, § 1 of the New York Laws of 1975. The phrase was not considered below.

** Numbers in parentheses refer to the appendices to this Jurisdictional Statement.

§ 661(3) as unconstitutional under the Equal Protection Clause and as conflicting with the federal regulation of immigration and naturalization (2a). *Rabinovitch* presented the same challenges to NYEL § 661(3) (Amended Complaint ¶¶ 22, 24) and claimed a violation of appellee's right to substantive due process of law because of the statute's alleged reliance upon a conclusive presumption that was not necessarily nor universally true in fact (Amended Complaint ¶ 23). *Rabinovitch* also included a demand for damages equal to the amount appellee allegedly would have received as a recipient of a Regents Scholarship and tuition assistance for the academic years 1973-74 and 1974-75 (Amended Complaint, Prayer for Relief ¶ 5).

The single district judges in *Mauclet* and *Rabinovitch* held that the constitutional claims were sufficient to vest the court with jurisdiction under 28 U.S.C. § 1343(3) and requested the Chief Judge of the Second Circuit to convene three-judge district courts (2a-3a; 6a-9a, 10a). The late Hon. Orrin G. Judd, the single district judge in *Rabinovitch*, also denied that appellee's motion for a class action order noting that a class action would not be a superior method of adjudication and that the allegations in support of the motion were speculative (9a-10a). The cases were then consolidated before a three-judge court (Appendix C, pp. 11a-12a) and determined on cross-motions for summary judgment.

Although NYEL § 661(3) authorizes state financial aid for alien students, the three-judge court held that the fact that some aliens were excluded was sufficient to create an "'*inherently suspect classification*'" subject to "'*close judicial scrutiny*'" [15a-16a, quoting *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971), emphases added by three-judge court]. Applying this strict standard, the court found the state interests advanced in support of the statute were insufficient. New York's interest in limiting its bounty to aliens who make an affirmative political commitment to the United States and to the state was viewed as a restatement of the 'special public interest' doctrine rejected in *Sugarman* v. *Dougall*, 413 U.S. 634, 644 (1973) and *Graham* v. *Richardson*, *supra* at 374 (17a). New York's interest in providing an inducement to aliens to become members of its political community and its interest in enhancing the education of its electorate were viewed as not "compelling" (18a). The three-judge court allowed appellee Rabinovitch standing to challenge NYEL § 661(3) insofar as it regulated student loans (as distinguished from tuition assistance and Regents Scholarships) although appellee had not applied for a student loan, and the record did not establish that he was qualified but for his alien status (15a). The court disallowed appellee's claim for damages relying on *Edelman* v. *Jordan*, 415 U.S. 651 (1974) (18a).

Reasons in Support of Plenary Consideration

The decision below erroneously extends *Graham* v. *Richardson*, 403 U.S. 365 (1971), by applying a strict equal protection standard to a classification which in fact benefits aliens as well as citizens and by rejecting as insubstantial New York's interest in rewarding aliens who choose to identify with its political community and its interests in enhancing the membership of that political community both in terms of numbers and educational level. The recent decisions of this court in *Mathews* v. *Diaz*, —— U.S. ——, 44 U.S.L.W. 4748 (June 1, 1976) and *Hampton* v. *Mow Sun Wong*, —— U.S. ——, 44 U.S.L.W. 4737 (June 1, 1976) conclusively establish the errors of the district court.

A. The equal protection standard applicable to NYEL § 661(3) is one of reasonable relation to a legitimate state interest.

NYEL § 661(3) authorizes state financial aid to students pursuing higher educations who are citizens, aliens willing to petition for naturalization, aliens presently disabled from petitioning but willing to seek naturalization when their disability ceases and alien refugees paroled to the

United States Attorney General. Plainly, the statute does not distinguish between citizens and aliens for the purpose of granting and denying a public benefit as did the statutes subjected to "strict scrutiny" in *Graham, supra; Sugarman* v. *Dougall,* 413 U.S. 634 (1973) and *In re Griffiths,* 413 U.S. 717 (1973). Once aliens are combined with citizens, as they are under NYEL § 661(3), they are not a "discrete and insular" minority, *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-153 n. 4 (1938), and no basis exists for heightend judicial solicitude. Cf. *Graham* v. *Richardson, supra* at 372. Thus, in sustaining a federal statute which excluded all aliens except those with five years permanent residence from Medicare benefits, this Court stated that the "real question presented" was not "whether the discrimination between citizens and aliens . . . [was] permissible; . . . [but] whether the statutory discrimination *within* the class of aliens . . . [was] permissible." *Mathews* v. *Diaz, supra* at 4452 (emphasis original). The Court then proceeded to apply the Fifth Amendment analogue of the reasonable relation test, stating that the burden of demonstrating the invalidity of the statute is upon the party challenging its constitutionality and consists of that party's advancing reasoning which will "at once invalidate" the classification "yet tolerate a different line separating some aliens from others." *Mathews* v. *Diaz, supra* at 4753.* The court

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* Appellants recognize that a federal statute was involved in *Diaz, supra,* and that this Court has noted that by reason of the paramount federal power over immigration and naturalization, some federal limitations on aliens may be enforced even though identical state limitations may be unconstitutional. *Hampton* v. *Mow Sun Wong, supra* at 4740. However, this distinction between federal and state power is inapposite with respect to the classification here in issue which distinguishes among aliens already lawfully admitted as did the *Diaz* statute and contravenes no federal statute or policy. Moreover, NYEL § 661(3) has less effect on the aliens excluded from benefits than did the *Diaz* statute since all that is disallowed herein is a financial incentive for higher education as opposed to medical insurance for the aged not readily available at the same cost in the private sector.

below erroneously placed this burden on the defendants, appellants herein (17a).

Even if the strict scrutiny standard is applied to NYEL § 661(3), appellants' showing in support of the statute does not consist of proof of its abstract "compelling" quality as required by the district court (18a), but simply in a showing of the "substantiality of the State's interest in enforcing the statute in question, and . . . the narrowness of the limits within which the discrimination is confined." *Sugarman* v. *Dougall, supra* at 642. In this context, it is significant to note that *Sugarman* was limited to a "flat ban on the employment of aliens in positions that have little, if any relation to a State's legitimate interest" (Id. at 647) and expressly excepted narrowly drawn citizenship qualification requirements from the strict scrunity standard (Ibid.). This Court has stated more recently that its prior decisions were not intended or suggest that a "State . . . may not be permitted some discretion in determining . . . whether aliens may receive public benefits or partake of public resources on the same basis as citizens," *Examining Board of Engineers, Architects, and Surveyors* v. *De Otero,* —— U.S. ——, 44 U.S.L.W. 4890, 4900 (June 15, 1976), and that disparate treatment between citizens and aliens "does not in itself imply" invidious discrimination. *Mathews* v. *Diaz, supra* at 4452.

B. The state aid provided to citizen students and to designated classes of aliens by NYEL § 661(3) is legitimately and substantially related to New York's interests in rewarding political affiliation with the United States and the state and in enhancing its own political community.

It is within a state's legitimate interest to enact legislation which takes into account the character of the relationship between an alien and his state and country. A state may decide that "as the alien's tie grows stronger, so does the

strength of his claim to an equal share of . . . [its] munificence." *Mathews* v. *Diaz, supra* at 4452. It may, in distributing its bounty, choose those who "may reasonably be presumed to have a greater affinity with the United States than those who do not. In short, citizens and those who are most like citizens qualify. Those who are less like citizens do not." Id. at 4753.

"Alienage itself is a factor that reasonably [can] be employed in defining 'political community,' " *Sugarman* v. *Dougall, supra* at 649, and it is well within a state's legitimate interests to enhance that political community by increasing the educational level of the electorate, *Spatt* v. *State of New York,* 361 F.Supp. 1048, 1053-1055 (E.D. N.Y.) aff'd 414 U.S. 1058 (1973), and by providing inducements to membership. *Hampton* v. *Mow Sun Wong, supra* at 4742, 4745.

NYEL § 661(3) is precisely tailored to these obviously substantial interests. The statute rewards those aliens who become "more like citizens" by pursuing naturalization either at present or when relieved of federally imposed disabilities. It provides an inducement to enter the state and national political community and seeks to assure that both old and new members of that community will attain the highest educational level they are capable of achieving, thus serving national and state interests in an educated electorate.

Although not considered by the district court, it is significant to note that the inclusion of the paroled refugee in the benefited class does not make the statute imprecise. Parole status precludes an alien's entry into the national or state political community at least until that status is changed. 8 U.S.C. § 1182(d)(5). See *Mathews* v. *Diaz, supra* at 4751 and n. 7. However, both national and state governments have long recognized their humane obligations to this special class of individuals who have sought

refuge in the United States from persecutions in the countries of their nationalities.

The only aliens excluded by NYEL § 661(3) are those, like appellees, who voluntarily refuse American citizenship, preferring to retain their national allegiances. As a result of the statute, these aliens are denied only some public aid in pursuing higher educations in New York, not the right to pursue that education at private or public institutions in the state. Plainly, these aliens are less deserving of public funds than the benefited class and the resulting limitation on their economic interests is minimal in comparison to the state interests served by the statute.

C. Appellee Rabinovitch does not have standing to challenge the constitutionality of NYEL § 661(3) insofar as it regulates the award of student loans as distinguished from tuition assistance and Regents Scholarships.

The district court allowed appellee Rabinovitch "expanded" standing to challenge the use of NYEL § 661(3) in the award of student loans although the record did not and could not establish that the appellee would be financially qualified for a loan at a date in the future when he might choose to apply (15a). The district court relied upon *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972) and *Barrows* v. *Jackson,* 346 U.S. 249 (1953) wherein claimants were permitted to invoke the constitutional rights of others when the claimants themselves were threatened with immediate harm. In contrast, appellee's claim has no immediacy because of his failure to apply, and the alleged injury to his constitutional rights is wholly speculative because the basis of the disposition of his application cannot be established in advance. Accordingly, this challenge to NYEL § 661(3) is not presented in an appropriate Article III context, and should have been disallowed. *O'Shea* v. *Littleton,* 414 U.S. 488 (1974); *Golden* v. *Zwickler,* 394 U.S. 103 (1969); *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, August 11, 1976.

Respectfully submitted,

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Appendix A

Opinion of the Single District Judge in *Mauclet* v. *Nyquist*.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-75-73

JEAN-MARIE MAUCLET,
Plaintiff

v.

EWALD B. NYQUIST, Commissioner of Education
of the State of New York,
Defendant

APPEARANCES: KEVIN KENNEDY, Esq. and
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for Defendant.

The plaintiff, a graduate student at the State University of New York at Buffalo, has been a resident of New York State since April 1969 and has been a permanent United States resident since November 1969. He is a French citizen.

Appendix A.

Plaintiff challenges the constitutionality of New York Education Law § 602.2 on the grounds that it unconstitutionally discriminates against resident aliens and conflicts with the constitutional and congressional scheme of comprehensive national regulation of immigration and naturalization.[1] The plaintiff, who has submitted an application for a tuition assistance program award for the academic year 1974-75, satisfies all requirements for an award except for citizenship. He moves for the convening of a three-judge court and for declaratory and injunctive relief.

Defendant has moved to dismiss the complaint on the ground that plaintiff's claim is insubstantial. A claim is insubstantial only if frivolous or "if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject." *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973). Under this standard, defendant's motion to dismiss must be denied and plaintiff's motion to convene a three-judge court granted.

Alienage has been held to be a suspect classification. *See, e.g., Graham* v. *Richardson*, 403 U.S. 365 (1971). Statutes that treat aliens differently from citizens require a great degree of precision. *Sugarman* v. *Dougall*, 413 U.S. 634, 642 (1973) (New York flat statutory prohibition against the employment of aliens in the competitive classified civil service unconstitutional). In *Jagnandin* v. *Giles*, 379 F. Supp. 1178 (N.D. Miss. 1974), a three-judge court invalidated a Mississippi statute which classified all alien students as non-residents for purposes of charging tuition and fees. A Virgin Islands law which barred noncitizen residents the right to participate in the Territorial Scholarship Fund solely by reason of their alienage was also held to be unconstitutional. *Chapman* v. *Gerard*, 456 F.2d 577 (3d Cir. 1972). The *Chapman* court discarded the argument, as have other courts, that participation in the scholarship fund is a privilege and not a right. *See also Shapiro* v. *Thompson*, 394 U.S. 613 (1969).

[1] Section 602.2 provides the following eligibility requirements and conditions governing awards:

> 2. Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (3) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible.

(McKinney's Supp. 1975)

Appendix A.

Applying the guidelines given in *Goosby* v. *Osser, supra,* and *Nieves* v. *Oswald*, 477 F.2d 1109 (2d Cir. 1973), the court finds that the complaint of the plaintiff does raise a substantial constitutional question within the meaning of the three-judge court statute.

Accordingly, the Honorable Chief Judge of the United States Court of Appeals for the Second Circuit is hereby requested to convene a three-judge court to hear and determine this cause.

So ordered.

JOHN T. CURTIN
JOHN T. CURTIN
United States District Judge

DATED: May 22, 1975

Appendix B

Opinion of the Single District Judge in *Rabinovitch* v. *Nyquist et al.*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74-C-1142

ALAN RABINOVITCH, on behalf of himself and on behalf of all others similarly situated; namely, all residents of New York State who have been or may be denied New York State Regents Scholarships, scholar incentive assistance awards and loans administered by the New York Higher Education Assistance Corporation solely on the basis of their status as aliens,

Plaintiffs,

—against—

EWALD B. NYQUIST, Commissioner of Education of the State of New York, THE UNIVERSITY OF THE STATE OF NEW YORK, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THE NEW YORK HIGHER EDUCATION ASSISTANCE CORPORATION and WILLARD C. ALLIS, DR. ERNEST BOYER, DR. JUDAH CAHN, WILMOT R. CRAIG, THOMAS P. DENN, WALTER A. KASSENBROCK, NORMA KERSHAW, REV. LAURENCE J. MCGINLEY, S. J., WILLIAM G. MORTON and RUSSEL N. SERVICE, being the members of the board of directors of said corporation,

Defendants.

Dated: May 23, 1975

Appendix B.

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JUDD, J.

MEMORANDUM AND ORDER

Plaintiffs have moved for the convening of a three-judge court and for certification of the case as a class action.

Facts

The complaint seeks injunctive relief against Section 602(2) of the New York Education Law. Plaintiff's attack is based on the claim that he was disqualified for a New

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York State Regents Scholarship, although he won a competitive test, because he is an alien who does not intend to apply for American citizenship. Plaintiff has been lawfully admitted to permanent residence within the United States and has resided in New York since 1964.

The claim for class action certification is based on the assertion that plaintiff knows five individuals who have been denied educational assistance funds because of their status as aliens and that the census figures indicate that there may be as many as 200,000 resident aliens who might seek the benefit of the statutes under attack.

Discussion

1. Jurisdiction of the action exists under 28 U.S.C. § 1343(3), without the necessity of establishing the jurisdictional amount of $10,000. *Hagans* v. *Lavine,* 415 U.S. 528, 535-36, 94 S.Ct. 1372, 1380 (1974).

2. In determining the necessity for a three-judge court, the issue is whether plaintiff's claim is "wholly insubstantial," *Bailey* v. *Patterson,* 369 U.S. 31, 33, 82 S.Ct. 594, 551 (1962), or whether "its unsoundness so obviously results from previous decisions of [the Supreme Court] as to foreclose the subject." *Ex parte Poresky,* 290 U.S. 30, 32, 54 S.Ct. 3, 4 (1933). See also *Goosby* v. *Osser,* 409 U.S. 512, 518, 93 S.Ct. 854, 858 (1973); *Rosenthal* v. *Board of Education,* 497 F.2d 726 (2d Cir. 1974).

The United States Supreme Court has recently held that alienage is not a valid reason for states to deny various benefits to persons.

In *Graham* v. *Richardson,* 403 U.S. 365, 91 S.Ct. 1848 (1971), the court struck down state statutes barring noncitizens or, in one case, those who had not been residents for fifteen years, from categorical assistance. It held that

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"classifications based on alienage, like those based on nationality, or race, are inherently suspect and subject to close judicial scrutiny." 403 U.S. at 372, 91 S.Ct. at 1852. It expressly rejected the argument that the "special public interest," *i.e.,* the "State's desire to preserve limited welfare benefits for its own citizens," justified restricting benefits to citizens and longtime residents. The court also suggested that such state statutes conflict with the "complete scheme of regulation" governing the qualifications for entry and status of immigrants which the federal government has enacted pursuant to its constitutional authority. 403 U.S. at 378, 91 S.Ct. at 1855.

In *Sugarman* v. *Dougall,* 413 U.S. 634, 93 S.Ct. 2844 (1973), the court voided a New York law barring noncitizens from permanent competitive positions in the state civil service, even though the "record does not disclose that any of the four appellees ever took any steps to attain United States citizenship." 413 U.S. at 638, 93 S.Ct. at 2845. Though the holding rested somewhat on the fact that the classification was both over and underinclusive with regard to the purported state purpose of limiting government service to those fully aware of American mores, the court cited *Graham* and basically decided that the state had failed to advance a forceful reason for employing a suspect classification. 413 U.S. at 642-46, 93 S.Ct. at 2848-49. It noted the various obligations of membership in the political community which resident aliens fulfill, and replied to the argument that resident aliens are more likely to leave the state at some time by quoting the lower court's view that the state would be "hard pressed to demonstrate that a permanent resident alien who has resided in New York or the surrounding area for a number of years . . . would be a poorer risk for a career position in New York . . . than an American citizen." 413 U.S. at 645, 93 S.Ct. at 2849, quoting 339 F. Supp 906, 909.

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In *In re Griffiths,* 413 U.S. 717, 93 S.Ct. 2851 (1973), the court invalidated a Connecticut statute which disqualified even permanent resident aliens from membership in the bar. It said that "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities." 413 U.S. at 722, 93 S.Ct. at 2855. The court found that the state had not proffered any persuasive justification.

The Supreme Court now has before it three cases bearing on the issues in this case. In *Mow Sun Wong* v. *Hampton,* 500 F.2d 1031 (9th Cir. 1974), *cert. granted,* 94 S.Ct. 3067, the lower court voided as violative of due process a regulation of the United States Civil Service Commission barring non-citizens from competitive positions. In *Weinberger* v. *Diaz,* 361 F. Supp. 1 (S.D. Fla. 1973) (three-judge court), *prob. juris. noted,* 94 S.Ct. 2381 (1974), the lower court invalidated the exclusion of aliens who have not been continuous residents for five years from a supplemental medical insurance plan enacted as part of Medicare. And in *Ramos* v. *United States Civil Service Commission,* 376 F. Supp. 361 (D. P.R. 1974) (three-judge court), appeal filed August 30, 1974, No. 74-216), the lower court held, after *Sugarman,* that the federal government could not exclude resident aliens from civil service employment or from eligibility for federal disaster relief loans.

The New York statute in question here was sustained by a state court in *Friedler* v. *University of New York,* 70 Misc.2d 444, 333 N.Y.S.2d 928 (Sup. Ct. Erie Co. 1972). This decision predated all the Supreme Court cases outlined above, except for *Graham,* which was not cited. It does not oblige this court to view plaintiffs' claim as "wholly insubstantial."

The issue in the case at bar was not decided in *Spatt* v. *New York,* 361 F. Supp. 1048 (E.D.N.Y. 1973), *aff'd,* 94

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S.Ct. 563 (1973), which merely upheld the requirement that Regents Scholarships be used at institutions within New York State. That case did not involve alienage, was decided on the "rational basis" test, and depended on specific purposes advanced by the state in support of the particular law.

No United States Supreme Court case has decided the effect of alienage on the right to public grants for higher education. In light of the Supreme Court cases outlined above, the basic issue in this case may be whether there is something about Regents Scholarships which sufficiently differentiates them from licensure in a profession, or eligibility for civil service employment, or public assistance, so that a state's discrimination against aliens would be permissible. It may be that scholarships are less vital to existence than a job or welfare grants, or it may be that the state can cite some compelling purpose which the classification advances. But the Supreme Court cases cited above, far from foreclosing a challenge to this statute, provide an array of philosophical and practical arguments militating against the constitutionality of this type of classification. It is therefore necessary to request the convening of a three-judge court, pursuant to 28 U.S.C. § 2281.

Plaintiffs' proposed amendment of the complaint to refer to the modified New York statute (L. 1974, c. 942) will not affect the conclusion in this memorandum.

3. The motion for class action status is based on the assertion that the class is a large one, but gives little attention to the requirement of F.R.Civ.P. 23(b)(3) that the court find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Apart from the fact that four students in the Buffalo area have brought actions attacking the statute within the last three years, the only evidence of the size of the class is based on estimates from census figures.

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Certifying the matter as a class action requires some identification of the members of the class and provision for notice at the expense of plaintiffs. *Eisen* v. *Carlyle,* 417 U.S. 156, 94 S.Ct. 2140 (1974). Class action procedure is therefore a cumbersome method, which is not particularly helpful where the issue is one of the constitutionality of a statute. Any decision of the legal issues in this case will have *stare decisis* effect, even more so if this case is consolidated with the case pending before Judge Curtin in the Western District of New York. *Mauclet* v. *Nyquist,* Civ. 75-73. The plaintiff in this case will not graduate until mid-1977. It is probable that the case will be decided on the merits before then. In this case no real necessity has been shown for treating the case as a class action.

It is ORDERED that the motion for the designation of a three-judge court be granted. The court will notify the Chief Judge of the Circuit.

It is further ORDERED that the motion for class action status be denied.

ORRIN G. JUDD
U.S.D.J.

Appendix C

Order Consolidating *Mauclet* and *Rabinovitch* for Hearing.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-75-73

JEAN-MARIE MAUCLET,

Plaintiff

—vs—

EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74-C-1142

ALAN RABINOVITCH, on behalf of himself and on behalf of all others similarly situated; namely, all residents of New York State who have been or may be denied New York State Regents Scholarships, etc.,

Plaintiffs

—against—

EWALD B. NYQUIST, Commissioner of Education of the State of New York, THE UNIVERSITY OF THE STATE OF NEW YORK, et al.,

Defendants

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These cases will be heard together on July 22, 1975 in New York City, the exact location not yet determined.

Briefs in these cases shall be submitted on the following schedule. Plaintiffs' briefs shall be filed not later than Friday, June 27, 1975. Defendants' responses shall be filed not later than Monday, July 14, 1975. Any reply briefs shall be received no later than Friday, July 18, 1975. A copy of each brief shall be forwarded to each judge on the panel.

So ordered.

JOHN T. CURTIN
JOHN T. CURTIN
United States District Judge

DATED: June 3, 1975

Appendix D

Opinion of the Three-Judge District Court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Before VAN GRAAFEILAND, Circuit Judge, JUDD, District Judge for the Eastern District of New York, and CURTIN, Chief Judge, Western District of New York.

CURTIN, Chief Judge:

Mauclet v. *Nyquist* was instituted by a resident alien in the Western District of New York; *Rabinovitch* v. *Nyquist* was brought by a resident alien in the Eastern District of New York. In both cases, New York Education Law § 661(3) (McKinney's Supp. 1975),[1] which requires an

[1] § 661(3), former § 602(2), provides, in pertinent part, as follows:

> Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship.
> (McKinney's Supp. 1975.)

applicant for New York State financial aid[2] to be a United States citizen or intend to become a citizen, was challenged as unconstitutional. The cases were consolidated and heard by a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284. The facts as set out below are not in dispute.[3]

Plaintiff Jean-Marie Mauclet, a resident of New York State since April 1969, is a graduate student at the State University of New York at Buffalo. He is a French citizen, married to an American citizen and father of an American citizen. He submitted an application for a tuition assistance award for the academic year 1974-1975 and satisfies all requirements for the award except citizenship.

Plaintiff Alan Rabinovitch, a Canadian citizen, has been a resident of New York State since 1964. In January 1973, Mr. Rabinovitch took the competitive Regents Qualifying Examination, and thereafter was informed by defendants University of the State of New York and the Board of Regents that he was qualified to receive a regents scholarship. Subsequently, Mr. Rabinovitch was informed that the offer of scholarship was withdrawn solely because he did not intend to become a citizen, as required by § 661(3).

Both plaintiffs seek a judgment declaring § 661(3) invalid, enjoining its enforcement and requiring defendants to process the plaintiffs' applications for assistance. In addition, plaintiff Rabinovitch requests damages for past

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[2] There are three general forms of student financial assistance: (1) General Awards, which include tuition assistance; (2) Academic Performance Awards, including regents scholarships; and (3) Student loans and loan guarantees. N.Y. Educ. Law §§ 667-680 (McKinney's Supp. 1975).

[3] Both plaintiffs motioned to amend their complaints to include the New York State Higher Education Services Corporation, an educational corporation formed in 1975, which coordinates the New York State financial aid programs. N.Y. Educ. Law § 652 (McKinney's Supp. 1975). The motions were granted orally at the three-judge court.

monies withheld by defendants. Both plaintiffs ask for attorney fees and costs.

Plaintiffs contend that § 661(3) denies to resident aliens the equal protection of the laws guaranteed by the fourteenth amendment, and conflicts with the comprehensive and preemptive congressional scheme regulating the entry and residence of aliens in the United States.

We must first resolve the preliminary question of standing. Clearly, plaintiffs have standing to contest the statute as it applies to the scholarship and tuition assistance award programs. However, defendants claim that plaintiffs do not have standing to challenge § 661(3) with respect to the student loan aspect of the program. Rabinovitch never applied for a student loan and Mauclet received one in the past, before he announced his intention not to become a United States citizen. At oral argument, the State admitted that had Rabinovitch applied for a student loan, and refused to make the required statement of intention to become a United States citizen, his application would have been refused. But the State apparently feels that the actual denial of an application is necessary to give plaintiffs standing to contest the constitutionality of § 661(3) as regards student loans. We do not agree.

Nothing would be gained by adjudicating the statute as it applies to all but one aspect of the assistance program. Both plaintiffs allege injuries from this statute. Both would be further injured were they to apply for student loans. We feel that this is a proper case in which to apply the expanded concept of standing and allow these plaintiffs to assert the rights of those aliens who are injured by this statute with regard to loans. *Eisenstadt* v. *Baird*, 405 U.S. 438, 443-446 (1972); *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

In *Graham* v. *Richardson*, 403 U.S. 365 (1971), the Supreme Court declared:

> [C]lassifications based on alienage, like those based on nationality or race, are *inherently suspect and subject*

> *to close judicial scrutiny.* Aliens as a class are a prime example of a "discrete and insular" minority . . . for whom such heightened judicial solicitude is appropriate. 403 U.S. at 372. (Footnotes and citations omitted, emphasis added.)

The defendants maintain that the classification involved here is not based on alienage per se because only those aliens who do not wish to become citizens are denied assistance. The defendants emphasize that the applications of many resident aliens have been granted after these individuals either applied for United States citizenship or signed a statement agreeing to do so as soon as they were eligible. This argument defies logic. Those aliens who apply, or agree to apply when eligible, for citizenship are relinquishing their alien status. Because some aliens agree under the statute's coercion to change their status does not alter the fact that the classification is based solely on alienage.

Next the defendants argue that since education is not a fundamental or basic constitutional right, *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973), the standard of strict judicial scrutiny is inapplicable. But it is long settled that where a suspect classification is involved, strict scrutiny is to be invoked whether or not the right involved is fundamental. *Graham* v. *Richardson, supra*, at 375-376.

In the case *In Re Griffiths*, 413 U.S. 717 (1973), in which a Connecticut rule excluding aliens from admission to the practice of law was struck down, the Supreme Court was explicit as to the burden a state must bear to justify the use of a suspect classification:

> The Court has consistently emphasized that a State which adopts a suspect classification "bears a heavy burden of justification," *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964), a burden which, though variously

> formulated, requires the State to meet certain standards of proof. In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest. 413 U.S. at 721-722 (footnotes omitted).

Defendants have failed to meet this burden. First they argue that the various forms of assistance are gratuities that can be distributed according to the sovereign's will. But the Supreme Court "has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham* v. *Richardson, supra*, at 374. Next the State asserts that its interest in an educated electorate, fully able to participate in community political life, and the plaintiffs' refusal to accept the responsibilities of citizenship, are sufficient reasons for it to limit assistance to citizens and future citizens. For this proposition, the State cites *Spatt* v. *New York*, 361 F.Supp. 1048, *aff'd* 414 U.S. 1058 (1973), in which the State's requirement that its assistance could only be used at colleges and universities within New York State was upheld. It is doubtful that defendants' explanation would survive even the rational relationship test applied in *Spatt*.[4] Although resident aliens may not vote, they pay taxes, register with the Selective Service, and "contribute in

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[4] The court in *Spatt* found no fundamental right or suspect classification invoking strict scrutiny, and therefore analyzed the State's interests under the rational relationship test. The court found that the State had a valid interest in encouraging gifted students to attend New York schools, in building a strong system of colleges within the State and in attempting to achieve an equalization of school financing costs between in-state and out-of-state students. None of the above mentioned interests are served by excluding qualified, tax-paying resident aliens.

myriad other ways to our society." *In Re Griffiths, supra,* at 722. In any case, the State has not demonstrated a compelling interest justifying its discriminatory classification. § 661(3) is therefore unconstitutional and defendants are enjoined from its enforcement. Defendants are directed to process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit, and to re-qualify plaintiff Rabinovitch as a State regents scholarship recipient, as of the date his complaint was filed.

Having ruled on plaintiffs' fourteenth amendment claim, there is no need to reach plaintiffs' argument that § 661(3) is unconstitutional because it encroaches on the exclusive federal power over aliens.

Plaintiff Rabinovitch requests money damages in addition to injunctive relief. While declaratory and injunctive relief is appropriate, it is the opinion of this court that *Edelman* v. *Jordan*, 415 U.S. 651 (1974), holding that the eleventh amendment barred the courts from ordering state officials to remit benefits wrongfully withheld from eligible welfare applicants, does not allow the award of money damages in this case.

So ordered.

s/ ELLSWORTH A. VAN GRAAFEILAND
Ellsworth A. Van Graafeiland
United States Circuit Judge

s/ ORRIN G. JUDD
Orrin G. Judd
United States District Judge
Eastern District of New York

s/ JOHN T. CURTIN
John T. Curtin
United States District Judge
Western District of New York

Dated: February 11, 1976.

Appendix E

Judgment of the Three-Judge District Court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

This action came on for trial before a three judge court, the Honorable Ellsworth A. Van Graafeiland, United States Circuit Judge, the Honorable Orrin G. Judd, United States District Judge, and the Honorable John T. Curtin, United States District Judge, presiding, and a memorandum and order of the court having been filed on February 17, 1976, that New York Education Law § 661(3) is unconstitutional and that defendants are enjoined from its enforcement and directing the defendants to process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit, and to re-qualify plaintiff Rabinovitch as a State regents scholarship recipient, as of the date his complaint was filed, and denying money damages to plaintiff Rabinovitch,

ORDERED and ADJUDGED that New York Education Law § 661(3) is unconstitutional and the defendants are enjoined from its enforcement, and that the defendants process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit, and

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re-qualify plaintiff Rabinovitch as a State regents scholarship recipient, as of the date his complaint was filed and that the plaintiff Rabinovitch is not entitled to money damages.

Dated: Brooklyn, New York
March 26, 1976

LEWIS ORGEL
Clerk

ELLSWORTH VAN GRAAFEILAND
U.S.C.J.

JOHN T. CURTIN
U.S.D.J.

ORRIN G. JUDD
U.S.D.J.

[Filed March 29, 1976
E.D.N.Y.]

Appendix F

Notice of Appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

NOTICE IS HEREBY GIVEN, that the defendants herein hereby appeal to the Supreme Court of the United States from so much of the amended final order and judgment of this Court entered March 29, 1976, which, *inter alia*, declared New York Education Law § 661(3) unconstitutional, enjoined its enforcement, directed the requalification of the plaintiff Rabinovitch as a State Regents scholarship recipient and the processing of plaintiff Mauclet's application for tuition assistance.

This appeal is taken pursuant to 28 U.S.C. § 1253.

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By

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[Filed May 28, 1976]